No. 83-985

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.,
Appellant,

VS.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO. et al.,
Appellants,

VS.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA, et al.,
Appellees.

On Appeal From the Supreme Court of California

MOTION TO DISMISS

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MOTION

Appellee, the California Department of Transportation (Caltrans), hereby moves to dismiss the appeal by the Southern Pacific Transportation Company (SP) from the judgment of the California Supreme Court, filed August 18, 1983, in SF 24525. Although Caltrans supports dismissal of the appeal as consolidated, since Caltrans was not a party to SF 24573, no argument will be submitted with respect to it. Caltrans submits, however, as it did before

the California Public Utilities Commission (CPUC), that the CPUC had the authority, upheld in SF 24573, to hold SP and its officers in contempt.

The appeal from SF 24525 must be dismissed on the following grounds:

1. The record does not show that the alleged federal preemption issue posed by SP was raised and expressly passed on;

2. Evaluation of circumstances shown in the record, and consideration of state law applicable to the case, demonstrate that the judgment of the California Supreme Court can rest on an independent and adequate state ground;

3. SP is barred by the doctrine of res judicata from further pursuing its preemption claim; and

4. No substantial federal question is presented by SP's appeal.

STATEMENT OF THE CASE

On January 14, 1983, SP petitioned the California Supreme Court for review of two decisions of the CPUC which augmented a much earlier, and now final, decision dated June 3, 1980. These two later decisions are 82-10-031 (125a)[1] and 82-10-041 (131a). On August 18, 1983, SP's petition was denied without opinion in SF 24525. (1a.) That judgment is the subject of this appeal.

By way of background, the earlier CPUC decision, Decision 91847 issued on June 3, 1980, is the original decision of the CPUC which ordered SP to operate the

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[1]This and all following such references are to SP's Appendix submitted with its jurisdictional statement.

service. (3a-65a.) Between June 3, 1980, and June 16, 1981, the CPUC issued three other and further decisions which amended various details of the original decision. These were Decisions 92862, 92863 and 93211. These three decisions together with the original decision were, some years ago, also brought by SP to the California Supreme Court for review. On December 23, 1981, the California Supreme Court denied these petitions for review.

SP did not appeal from or seek further review by this Court of these earlier judgments of the California Supreme Court. (262a.) Instead, SP awaited the issuance of a further implementing CPUC decision on June 2, 1982 (115a), and then sought an injunction against that decision in the United States District Court, Northern District of California, arguing that the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (Staggers) had preempted* all CPUC authority over all intrastate rail transportation. (250a-256a.) On August 9, 1982, the District Court ruled that the issue had been settled by the California Supreme Court, and that its judgments rendered on December 23, 1981, operated as a bar to SP's complaint. (252a-253a.) The Ninth Circuit Court of Appeals affirmed. *Southern Pacific Transportation Co. v. Public Utilities Commission, et al.*, (9th Cir. 1983) 716 F2d 1285, petition for writ of certiorari pending.

ARGUMENT

I

THE RECORD DOES NOT SHOW THAT THE PREEMPTION ISSUE POSED BY SP WAS RAISED AND EXPRESSLY PASSED ON BY THE CALIFORNIA SUPREME COURT IN THE PROCEEDING FROM WHICH THIS APPEAL IS TAKEN, SF 24525

The California Supreme Court denied SP's petition for review of CPUC Decisions 82-10-031 and 82-10-041 *without opinion.* The record shows that in Decision 82-10-031, SP argued to the CPUC against the "authority" of the CPUC to permit Caltrans to enter SP's property and construct station facilities thereon. No federal basis for this challenge to the CPUC's authority is set forth. (127a.) In Decision 82-10-041, SP's "objections to the jurisdiction of the commission" were noted by the CPUC without any reference to a federal basis for such objection. (132a.) SP also advised the CPUC that it could not undertake construction of the remaining station facilities based on its "position in its pending action in the federal courts challenging the commission's jurisdiction over the subject matter." (132a-133a.) However, this did not include an express challenge to the validity of the CPUC's order in Decision 82-10-041 based on Staggers.

This Court has stated in *Lynch v. New York* (1934) 293 U.S. 52, 54:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary

> to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it . . ."

Appellant has the burden to show the existence of a federal question, properly presented. *Durley v. Mayo* (1956) 351 U.S. 277, 284-285.

Although SP has presented its preemption argument at various times during many prior proceedings, and discusses it at length in its jurisdictional statement, SP does not show that it was raised and expressly passed on in the two CPUC decisions reviewed by the California Supreme Court in SF 24525. The appeal must be dismissed. *White River Lumber Co. v. State of Arkansas* (1929) 279 U.S. 692.

II

INDEPENDENT STATE GROUNDS COULD SUPPORT THE JUDGMENT

In *Stembridge v. State of Georgia* (1952) 343 U.S. 541, this Court held (at 547):

> ". . . Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. [Citations omitted.]" (Emphasis by the Court.)

See also: *Durley v. Mayo, supra,* 351 U.S. 277, 281.

This Court reexamined the issue of adequate and independent state grounds in *Michigan v. Long* (1983) ..... U.S. ....., 103 S.Ct. 3469, and continued to support the concept that appeal lies only from a state decision which "fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . ." (103 S.Ct. at 3476.) Such

is not the case here. The judgment herein, rendered without opinion, does not appear in any way to rest on federal law. As will be shown below, it undoubtedly was decided on the basis of state law alone.

California law is designed (1) to provide for the thorough review of CPUC decisions and (2) to ensure that, once the review processes are completed, the decisions shall become final and not subject to further challenge.

To this end, California Public Utilities Code section 1731 provides for rehearing by the CPUC with respect to "any order or decision" of the CPUC, and denies further judicial relief where rehearing is not sought.[2]

California Public Utilities Code section 1756 provides for direct review by the California Supreme Court of all orders and decisions of the CPUC following decision on rehearing or where rehearing has been denied.

California Public Utilities Code section 1709 provides that the orders and decisions of the CPUC which have become final shall be conclusive in all collateral actions or proceedings.

These statutory concepts are designed to bring finality to the decisions of the CPUC. As stated in *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 633: "That conclusiveness arises by operation of law." When the CPUC has acted, and a party is dissatisfied, that party's interests are protected by its right to petition the California Supreme Court for a writ of review. (*Id.*, at 632.) And, as

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[2]This and all other sections of the California Public Utilities Code referred to are reproduced in an appendix hereto.

the California Supreme Court further observed in the *Western Air Lines* case, a party who is still dissatisfied has the further "right to apply to the Supreme Court of the United States for relief on federal constitutional grounds." (*Id.*)

SP's present position is quite clear. SP believes it can lie in the weeds, allowing CPUC decisions to become final, and then appeal previously argued matters again and again before the California Supreme Court at each instance of a further implementing order relating to the CPUC's earlier decisions.

Such a procedure is not permitted under California law. As the California Supreme Court stated in *Northern Cal. Assn. v. Public Util. Com.* (1964) 61 Cal.2d 126 at 135:

> "... [Petitioner] cannot now cure its failure seasonably to seek judicial review of the certificate decision by the device of a series of late-filed petitions, basing its right to review on the latest among them, when, in fact, it is seeking review of the basic decision. If such a device were allowed, one obtaining a certificate from respondent commission could never safely act under it without fear of later attack."

Appellant has failed to show that the judgment of the California Supreme Court does not rest on the foregoing state law principles. As stated in *Durley v. Mayo, supra,* 351 U.S. 277, 281:

> "In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. . . ."

Moreover, these concepts of California law are based on general law, and not the Constitution, treaties, or statutes of the United States.

See *City and County of San Francisco v. Itsell* (1890) 133 U.S. 65:

> ". . . In the present case, the record of the pleadings, findings of fact, and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the cases and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it, and in favor of the grantor of the defendants in error, was a bar to this action. That was a question of general law only, in no wise depending upon the constitution, treaties, or statutes of the United States. *Chouteau v. Gibson*, 111 U.S. 200, 4 Sup. Ct. Rep. 340. Writ of error dismissed, for want of jurisdiction."

III

SP IS BARRED BY THE DOCTRINE OF RES JUDICATA FROM FURTHER PURSUING ITS PREEMPTION CLAIM

As noted earlier, the CPUC on June 30, 1980, entered its basic decision herein, Decision 91847. (3a.) Said decision found that public convenience and necessity required that SP commence passenger train service between Union Station in Los Angeles and Oxnard, with various intermediate stops.

Following petition for rehearing by SP, there were further proceedings before the CPUC, but the basic decision requiring the service was left intact. The CPUC did, how-

ever, stay the effect of certain implementing paragraphs, a stay which remained in effect until June 2, 1982.[3]

In the meantime, SP pursued its prior petitions for review before the California Supreme Court arguing, inter alia, that the CPUC had lost jurisdiction as a result of preemption by reason of the Staggers Rail Act of 1980.

After the California Supreme Court denied SP's petitions for review, SP did not pursue an appeal or other proceeding before this Court. Hence all matters previously concluded were now finally concluded and embraced in the judgments of the California Supreme Court.

On June 2, 1982, the CPUC rendered Decision 82-06-045 (115a.) That decision dissolved the previously imposed stay and specifically ordered SP to take those actions necessary to proceed with the service previously ordered. That decision is now also final *under state law,* no petition for rehearing having been filed. Cal. Pub. Util. Code, §§ 1731 and 1756; *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 902.

No purpose would be served in repeating the able discussion, on the subject of res judicata, by the Ninth Circuit which is now before this Court pursuant to SP's separate petition for a writ of certiorari. It is clear that SP cannot avoid the preclusive effect of the California Supreme Court

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[3]SP argues in its Jurisdictional Statement (p. 22) that the purpose of the stay was to give the CPUC opportunity to challenge the constitutionality of Staggers in another forum. *Nothing in the record supports this contention.* It is submitted that a more likely purpose of the stay was to give SP an opportunity to pursue its challenges to state authority by way of writ of review before the California Supreme Court.

judgments which followed SP's petitions from earlier decisions of the CPUC. The appropriate time to have challenged these judgments, before this Court, was within the time provided for in 28 U.S.C. section 2101. That time has long since expired. SP's present appeal should therefore be dismissed.

IV

SP'S ARGUMENT THAT PREEMPTION ISSUES WERE NOT "RIPE" IS READILY REFUTED

SP argues that it could not have appealed to this Court from the December, 1981, judgments of the California Supreme Court because, at that time, issues arising from the state *administrative proceedings* were not ripe for review. SP asserts that the case was still pending before the CPUC and might be resolved on nonfederal grounds.

This argument is wholly without merit.

The judgments of the California Supreme Court, *which are the judgments in question on this issue,* were final. That court considered SP's preemption arguments and failed to grant SP's requested relief. Thus the highest court in California approved the CPUC's continuing exercise of jurisdiction with regard to this intrastate service.

The rule is well settled that where a litigant asserts that it is immune from a regulatory program of the sort asserted against it, the case is ripe for decision. (See generally Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction, § 3532, p. 244.) When the question is whether it is constitutional to fasten an administrative procedure onto a litigant, this purely legal issue is ripe

for decision. *Public Utilities Commission v. United States* (1958) 355 U.S. 534; *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 149.

Moreover, if SP's argument were accepted, the result would be that the issue still is not ripe for consideration. The service has been suspended (156a), and the CPUC is holding the proceeding open for additional evidence on public subsidy issues and other matters (156a-157a). Indeed, under this hypothesis, the very case relied upon by SP, *Dump Truck Owners Association v. Public Utilities Commission* (1977) 434 U.S. 9, would indicate that, if the issue was not ripe in 1981, it certainly is not ripe now.

V

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

A. The Staggers Amendments Only Affected Freight Rates

Although California has not sought certification, this could only affect California's jurisdiction to regulate rates; it could not affect California's jurisdiction over intrastate rail transportation in general, including orders that service be provided. 49 U.S.C. section 11501(b)4(A) provides in part:

> ". . . Any State authority . . . which does not seek certification may not exercise any jurisdiction over intrastate rates, classification, rules and practices until it receives certification under this subsection."

The Staggers Act and its congressional history further shows that Staggers' preemption in uncertified states is limited to *freight* rates. Congress wanted to increase rail

freight revenues by allowing the railroads to compete more effectively with other modes of transportation through "a regulatory process that balances the needs of the carriers, shippers, and the public." 1980 U.S. Code Cong. & Ad. News, 4110, 4111. The decline in the railroad's market share, discussed at length in the House Report, concerned freight traffic rather than passenger service. 1980 U.S. Code Cong. & Admin. News, 3983.

In respect to the Act itself, 49 U.S.C. section 10709(d)(1)(A) defines "fixed and variable cost" as "all cost incurred by rail carriers in the transportation of freight. . . ." In determining fixed and variable costs, the commission is directed to use the ICC's Rail Form A which is a *freight* costing methodology. (49 U.S.C. § 10705a(m)(1).) See also 49 U.S.C. section 10707(a)(1)(A) which defines the term "base rate" with respect to ". . . the transportation of a particular commodity. . . ." The term "commodity" precludes consideration of passenger traffic. Title III of the Act further authorizes the ICC to create a uniform freight accounting system and establishes a Railroad Accounting Principles Board to promulgate freight cost accounting principles. By contrast, the Act nowhere mentions passengers, nor does it require uniform passenger accounting principles.

B. SP's Reliance on California's "Request" Is Misleading and Misplaced

SP, in its attempt to show that substantial federal issues are involved, relies heavily on a claim that the CPUC has affirmatively relinquished its jurisdiction to the ICC. SP argues that "California *requested* that the ICC assume

jurisdiction over California intrastate rail transportation, and the ICC took jurisdiction on May 11, 1982." (Jurisdictional Statement, p. 17.) SP's argument buckles, however, when it goes on to disclose that California's request was actually limited to *freight* service. SP then seeks to avoid this fact by arguing that there is no basis under Staggers for bifurcating the ICC's jurisdiction, citing 49 U.S.C. section 11501(b)(4), subsection (A).

In so arguing, SP hopelessly confuses the preemptive provisions of 49 U.S.C. section 11501(b)(4), subsection (A) with a nonstatutory, administratively adopted, process developed by the ICC for acceding to state requests that it assume jurisdiction.

Subsections (A) and (B) of 49 U.S.C. section 11501(b)(4) are the two relevant provisions under Staggers pertaining to changes in state and federal jurisdiction over intrastate rail matters. The operative language in the two sections reads markedly different and it does not follow that a preempted loss of state jurisdiction automatically equates with a gain of federal jurisdiction.

As noted earlier, subsection (A) prohibits uncertified states from exercising jurisdiction over "intrastate rates, classifications, rules, and practices . . ." It applies *both* to situations where a state certification request is made and denied as well as to situations where certification is not requested at all.

Subsection (B) is the only provision under Staggers which purports to grant any jurisdiction to the ICC over intrastate service. Its grant of jurisdiction is limited, however, *solely* to situations where a state *has requested and*

has been denied certification, a situation not applicable to California. In all other respects, the ICC is prohibited by 49 U.S.C. section 10501(b) from exercising jurisdiction over intrastate rail transportation.

Observing the limited nature of its authority under subsection (B) (namely that subsection (B) authorizes ICC regulation "only where a State has unsucessfully applied to the Commission for certification . . ."), the ICC, in Ex Parte 388, Decision dated January 25, 1982, agreed to "accede" to state "requests" that the ICC exercise jurisdiction. (See appendix to the Petition for a Writ of Certiorari, p. 97a, at pp. 99a-101a.)

Considering these matters together, it becomes most clear that SP's argument about "bifurcating" the ICC's jurisdiction simply reads into Staggers something *which is not there.* Subsection (A) relied upon by SP, deals with *state jurisdiction*—it has no bearing on *ICC jurisdiction.* And, whatever jurisdiction the ICC may have obtained from its "request" procedure, flows not from subsections (A) or (B) but instead from Ex Parte 388 and the ICC's willingness to honor state requests. Obviously, the ICC cannot "accede" to more than has been asked. In any event, SP's argument that a request limited to freight is to be treated as a request to regulate all forms of rail transportation does not find support in Staggers or, for that matter, elsewhere. Neither does it raise any substantial federal question requiring argument before this Court.

CONCLUSION

For these reasons, the appeal filed herein should be dismissed.

Respectfully submitted,

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January 1984

APPENDIX

Excerpts from the California Public Utilities Code.

Section 1709:

"In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

Section 1731:

"After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision, or, if the commission fixes a date earlier than the 20th day after issuance as the effective date of the order or decision, unless the corporation or person has filed such application for rehearing before the 30th day after the date of issuance, or before the 10th day after the date of issuance in the case of an order issued pursuant to Article 5 (commencing with Section 816) and Article 6 (commencing with Section 851) of Chapter 4 of this division relating to security transactions and the transfer or encumbrance of utility property."

Section 1756:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified."